BANK OF NEW ZEALAND

v.

DATO' WONG KEE TAT

HIGH COURT MALAYA, KUALA LUMPUR
EUSOFF CHIN J
[ORIGINATING SUMMONS NO. R8-24-7-89]
22 FEBRUARY 1990

CIVIL PROCEDURE: *Reciprocal enforcement of judgments between Singapore and Malaysia - Sections 4, 5 of the Reciprocal Enforcement of Judgment Act 1958.*

The defendant, a Malaysian resident was named as the second defendant in a suit in Singapore in respect of a loan by the plaintiff. The first defendant, Phelim Investment Pte. Ltd., is a resident of Singapore. On 18 October 1988 the plaintiff obtained judgment against both defendants.

On 14 January 1989, the plaintiff applied for the original judgment to be registered as a judgment of the High Court of Malaya under s. 4 of the Reciprocal Enforcement of Judgment Act 1958, so that it may be enforced against the second defendant, Dato Wong.

On 13 February 1989 the Senior Assistant Registrar (SAR) of the High Court made an order for the registration of the original judgment here.

On 24 May 1989, the defendant made an application to set aside the registration. The SAR dismissed this application on 16 December 1989. The defendant then appealed to the Judge in chambers.

Counsel for the defendant's argument was that although he had been properly served with the notice of the concurrent writ and order of service out of jurisdiction, the service on him of the writ of summons and the amended statement of claim had not been properly done since there was no further order of the original Court for service of these further documents on him out of jurisdiction. Thus, the defendant was not bound to make an appearance in the original Court.

Held:

[1] The plaintiff's Counsel argued, and this Court agrees with him, that if there had been any irregularity or non conformity of the rules of the Court, the defendant ought to have gone to the original Court to rectify the error by applying to set aside the judgment in default of appearance.

[2] This Court finds that the defendant had been properly served with the notice of the concurrent writ on 6 May 1988. He had 21 days to enter appearance. The defendant did not avail himself of this opportunity to enter an appearance and file his defence against the claim. His reason is that the original Court had no jurisdiction over him.

[3] This Court's finding is that the original Court had jurisdiction to try the proceedings. This Court therefore dismiss this appeal and confirm the order of the SAR dated 16 December 1989 in which he refused to set aside the registration of the High Court of Singapore.

[Appeal dismissed]

Cases referred to:

Malayan Banking Berhad v. International Tin Council & Anor appeal [1989] 1 CLJ (Rep) 87
Pemberton v. Hughes [1899] LR 1 Ch D 781
Anthinarayana Mudaliar v. Ajit Singh [1953] MLJ 229
Contract and Trading Company (Southern) Ltd. v. Barbey & Ors. [1960] AC 244

Legislation referred to:

Exchange Control Act 1953, ss. 4, 36
Reciprocal Enforcement of Judgments Act 1958, ss. 5(1)(a)(ii), (v), 4
Supreme Court of Judicature Act 1964 [Sing], s. 16(1)
Courts of Judicature Act 1964, s. 23(1)(b)

For the plaintiff - Nadkarni; M/s. Skrine & Co.
For the defendant - M.S. Murthi; M/s. Murthi & Partners

JUDGMENT

Eusoff Chin J:

It is not disputed that the plaintiff had commenced a suit No. 164/88 in the High Court of Singapore (the original Court) against Phelim Investment Pte. Ltd., and Dato Wong Kee Tat (defendant here). On 18 October 1988, the plaintiff obtained judgment against them.

The first defendant in that suit, is a resident of Singapore, but the 2nd defendant Dato' Wong Kee Tat is resident in Kuala Lumpur, Malaysia.

On 14 January 1989, the plaintiff applied for the original Court's judgment dated 18 October 1988, to be registered as a judgment of the High Court Malaya under s. 4 of the Reciprocal Enforcement of Judgment Act 1958 (Act 99) so that it may be enforced against Dato' Wong (the defendant).

On 13 February 1989, the Senior Assistant Registrar of the High Court made an order for the registration of the judgment of the original Court. That judgment was a judgment in default of appearance, and it was for:

(1) The sums of RM4,249,936.32 (equivalent to S$3,194,240 at the exchange rate of S$100 to RM133.05 as at 18 October 1988) and RM20,855.91 (equivalent to S$15,675.24);

(2) Accrued interest of RM264,976.14 (equivalent to S$199,155.31) as at 31 December 1987 together with further interest on S$3,194,240 at 2½% per annum above the plaintiffs' effective costs of funds from 1 January 1988 to date of judgment amounting to RM311,264.17 (equivalent to S$233,945.26);

(3) Costs of RM1,000.32 (Equivalent to S$827.00);

(4) Further interest of 8% per annum is payable on the judgment debt from 18 October 1988 until date of payment.

On 24 May 1989 the defendant applied for an order to set aside the order for registration. On 16 December 1989 the Senior Assistant Registrar dismissed this application to set aside. The defendant appealed to the Judge in chambers. The grounds relied upon by the defendant are:

1. That there has been no due service of the originating process in that the defendant was never served with the writ of summons of the Court of the original jurisdiction.

2. That there has not been voluntary submission to the jurisdiction of the Court of original jurisdiction.

3. That the registration was done contrary to the Reciprocal Enforcement of Judgment Act 1958.

4. That the Court of the original jurisdiction had no jurisdiction over the defendant.

5. That the enforcement of the judgment would be contrary to public policy in Malaysia in that the municipal laws of the Singapore are being enforced through these proceedings.

6. That the notice of proceedings in Singapore was not received in time to give sufficient time to enable the defendant to defend the proceedings.

7. That the defendant did not appear at the proceedings in Singapore.

8. That prior to the suit no. 164/88 the plaintiff has commenced an earlier suit and had obtained default judgment.

9. That the subject matter of the suit was a loan transaction calculated to defeat the operation of the provision of the Exchange Control Act of Malaysia.

10. That the procurement of the guarantee was not approved by the Controller of Foreign Exchange Malaysia.

The affidavit of the solicitor for the defendant stated that he was authorised by the defendant to accept the cause papers. On 6 May 1988 he had received the notice of the concurrent writ and the order for service out of jurisdiction of the original Court, from a process server. The order for service out of jurisdiction gave the defendant 21 days after the service of the notice of the concurrent writ within which he had to enter an appearance.

On 16 August 1988, the defendant's solicitor received through the post a copy of the writ of summons from the plaintiff's Singapore solicitors, together with an amended statement of claim, amending by deleting and adding certain figures in the original statement of claim but otherwise the total amount claimed, remained the same.

The defendant did not enter an appearance in the original Court within the stipulated 21 days, and on 18 October 1988 the original Court gave judgment in default of appearance against the defendant.

The learned Counsel for the defendant relied on s. 5(1)(a)(ii) and (v) of the Reciprocal Enforcement of Judgments Act 1958 (Act 99) which is:

> 5.(1) On an application in that behalf duly made by any party against whom a registered judgment may be enforced, the registration of the judgment:
>
> (a) shall be set aside if the registering Court is satisfied:
>
> (ii) that the Courts of the country of the original Court had no jurisdiction in the circumstances of the case;
>
> (v) that the enforcement of the judgment would be contrary to public policy in Malaysia;

The learned Counsel's argument is that although he had been properly served with the notice of the concurrent writ and order of service out of jurisdiction, the service on him of the writ of summons and the amended statement of claim had not been properly done since there was no further order of the original Court for service of these further documents on him out of jurisdiction. Therefore the defendant was not bound to make an appearance in the original Court. The judgment of the original Court was founded on the amended statement of claim,

and since the amended statement of claim had not been properly served on him, the original Court should not have given the judgment in default of appearance. He alleged that the original Court had acted without jurisdiction when giving that judgment for the plaintiff.

The plaintiff's Counsel argued, and I agree with him, that if there had been any irregularity or non conformity of the rules of Court, then the defendant ought to have gone to the original Court to rectify the error, by applying to set aside the judgment in default of appearance.

I find that the defendant had been properly served with the notice of the concurrent writ on 6 May 1988. If he had wanted to enter appearance within 21 days of the date of that service, the last day would have been 27 May 1988. The defendant did not avail himself of this opportunity to enter an appearance and filed his defence against the claim. His reason is that the original Court had no jurisdiction over him. The question of jurisdiction had been dealt with in a similar case by Yusof Abdul Rashid (J) in *UMBC Bhd. v. Soo Lean Tooi & Ors.* [1984] 1 MLJ, 47. There, the learned Judge held that s. 16(1) of the Supreme Court of Judicature Act 1964, conferred jurisdiction on the High Court of Singapore to try all civil proceedings where one of several defendants resided or had his place of business in Singapore. In Malaysia, s. 23(1)(b) of the Courts of Judicature Act 1964 has similar provision as that of the Singapore law. In *Malayan Banking Berhad v. International Tin Council & Anor appeal* [1989] 1 CLJ (Rep) 87, the Supreme Court decided that the High Court in Malaysia has jurisdiction to try civil proceedings where one of several defendants resides in this country, and the High Court may give leave to issue and serve out of jurisdiction, a notice of concurrent writ of summons on a co-defendant residing in London. Further, the Supreme Court held that service is not the sole foundation of jurisdiction of our High Courts.

The learned Counsel for the defendant submitted that there was no judgment against the defendant because the subsequent service by post of the copy of the writ of summons and the amended statement of claim was not done by leave of the High Court of Singapore. The writ of summons itself was endorsed with the words: "Not for service out of jurisdiction".

The learned defence Counsel further submitted that there was an irregularity or slip in the course of the proceedings in the original Court leading to the obtaining of the judgment by the plaintiff. That omission to comply with the rules of procedure by the original Court goes to the root of jurisdiction, and that therefore it must be treated as if there is no judgment of the original Court against the defendant.

My finding is that the original Court had jurisdiction to try the proceedings. In the exercise of its jurisdiction, the original Court had granted leave for notice of the concurrent writ to be served on the defendant who chose not to defend himself. He did not even file an application to the original Court to set aside the judgment in default.

In *Pemberton v. Hughes* [1989] LR 1 Ch D 781 the plaintiff claimed her share of property from the estate of her deceased husband. The other beneficiary alleged that the plaintiff was not legally divorced by her former husband before she married the deceased because the writ of subpoena for the divorce proceedings is sued by the Florida Court did not comply with the rules of the Florida Court. The rules there provided that the time for appearance must not be less than 10 clear days from the date of the issue of the writ. The writ only gave 9 clear days. Because of this irregularity, it was argued that the whole of the subsequent proceedings was rendered null and void, and therefore the decree for divorce was of no effect whatever. Consequently the plaintiff could not marry the deceased. The High Court came to the conclusion that this defect went to the root of the jurisdiction of the Florida Court and was fatal to the validity of the divorce. On appeal, the Court of Appeal held:

> Here it is alleged there was no proper service. The true principle seems to me to be that a judgment, whether in personam or in rem, of a superior Court having jurisdiction over the person must be treated as valid till set aside either by the Court itself or by some proceeding in the nature of a writ of error, unless there has been some defect in the initiation of proceedings, or in the course of proceedings, which would make it contrary to natural justice to treat the foreign judgment as valid, as, for instance, a case where there had been not only no service of process, but no knowledge of it. The allegation of no service alone would not in such a case avail the defendant.

As stated earlier, there is no doubt that the defendant was subject to the jurisdiction of the original Court. He had been served with notice of concurrent writ to enter an appearance in the original Court. He had been given an opportunity of having a hearing in the original Court. He could have entered a conditional appearance and challenged the jurisdiction of the original Court. But he had deliberately refused to exercise that opportunity.

In *Anthinarayana Mudaliar v. Ajit Singh* [1953] MLJ 229, it was decided that:

> A judgment or decree pronounced by the Court of a foreign country will be treated and acted upon here as final, notwithstanding any irregularity of procedure under the local law, provided the foreign Court had jurisdiction over the subject matter and the person brought before it, and the proceedings do not offend against natural justice.

As regards the allegation that the borrowing had been transacted without the permission of the Controller of Foreign Exchange (Controller) and therefore in contravention of s. 4 of the Exchange Control Act 1953 (the Act) and consequently it was void for illegality, this issue had been dealt with by Shankar J in *Bumiputra Malaysia Finance Ltd. v. Datuk Syed Kechik and 4 Ors*. in Kuala Lumpur C/S C23-1989-86. I agree with the views held by him that the borrowing does not make the act illegal by virtue of s. 36 of the Act. Further, the non obtaining of permission of the Controller before the borrowing puts the borrower or lender to risk of being prosecuted and sentenced under para. 7 part II of the First Schedule to the Act.

It as also held in *Contract and Trading Company (Southern) Ltd. v. Barbey & Ors.* [1960], AC 244 that the Exchange Control Act 1974 does not provide a moratorium for debtors but controls the immediate destination of the payments they make. Moneys due under judgments can be paid into Court; thus discharging the debtor, and the fund itself remains out of the control of the creditor until consent had been obtained.

I therefore dismiss this appeal, and confirm the order of the Senior Assistant Registrar dated 16 December 1989, in which he refused to set aside the registration of the judgment of the High Court of Singapore.

Also found at [1990] 1 CLJ 1130